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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 41892
Plaintiff-Respondent,	)	
	)	JEROME COUNTY NO. CR 2013-4140
v.	)	
	)	
SHEPHERD REALE,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF JEROME

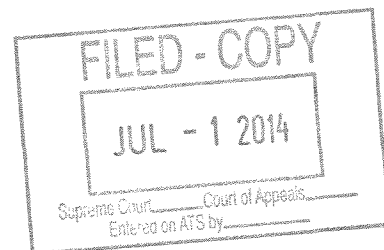
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## TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE .....	1
Nature of the Case .....	1
Statement of the Facts and Course of Proceedings .....	1
ISSUES PRESENTED ON APPEAL .....	5
ARGUMENT .....	6
I. Substantial Evidence Did Not Support The Restitution Award Of \$3315.68 To Ms. Shepard For Lost Wages .....	6
A. Introduction .....	6
B. Standard Of Review And Applicable Law .....	6
C. Substantial Evidence Did Not Support The Award Of \$3315.68 For Lost Wages To Ms. Shepard, Because The Award Was For Time She Spent Resting Instead Of Going To Work .....	8
D. Even If Ms. Shepard's Time Spent Resting Instead Of Going To Work Is Awardable As Restitution For Lost Wages, Substantial Evidence Did Not Support The Full Award Of \$3315.68 .....	13
II. The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Fifteen Years, With Three Years Fixed, Upon Mr. Reale Following His Plea Of Guilty To Sexual Abuse Of A Child Under Sixteen Years Of Age .....	15
CONCLUSION .....	20
CERTIFICATE OF MAILING .....	21

## TABLE OF AUTHORITIES

### Cases

<i>State v. Corbus</i> , 150 Idaho 599 (2011) .....	<i>passim</i>
<i>State v. Houser</i> , 155 Idaho 521(Ct. App. 2013) .....	<i>passim</i>
<i>State v. Jackson</i> , 130 Idaho 293 (1997).....	16
<i>State v. Lampien</i> , 148 Idaho 367 (2009) .....	7
<i>State v. Oliver</i> , 144 Idaho 722 (2007) .....	16
<i>State v. Olpin</i> , 140 Idaho 377 (Ct. App. 2004) .....	9, 10, 11
<i>State v. Russell</i> , 126 Idaho 38 (Ct. App. 1994) .....	9, 10, 11
<i>State v. Strand</i> , 137 Idaho 457 (2002) .....	16
<i>State v. Straub</i> , 153 Idaho 882 (2013) .....	6

### Statutes

I.C. § 19-4304(7) .....	6
I.C. § 19-5304 .....	<i>passim</i>

## STATEMENT OF THE CASE

### Nature of the Case

Pursuant to a plea agreement, sixty-seven-year-old Shepherd Reale pleaded guilty to felony sexual abuse of a child under sixteen years of age. The district court imposed a unified sentence of fifteen years, with three years fixed. The district court also ordered Mr. Reale to pay the parents of the victim \$4355.68 in restitution.

On appeal, Mr. Reale asserts that substantial evidence did not support the award of \$3315.68 in restitution for lost wages of the mother of the victim, because the award was for time the mother spent resting instead of going to work. Whether a district court may award "lost wages" restitution for the time a victim spent resting instead of going to work (as opposed to attending court proceedings instead of going to work) is a question of first impression. Mr. Reale also asserts that the district court abused its discretion when it imposed his sentence.

### Statement of the Facts and Course of Proceedings

Eight-year-old M.S. reported that Mr. Reale had rubbed her chest and vaginal area through her clothing while she was at his house. (Conf. Exs., p.37.)<sup>1</sup> M.S. also stated that Mr. Reale had kissed her mouth, bare neck, bare chest, and bare stomach, and that she had seen his "privates." (Conf. Exs., p.37.) When Officer Edward Gates of the Jerome Police Department contacted Mr. Reale, he gave the officer full access to his medical records from the VA Medical Center in Boise. (Conf. Exs., p.37.) He did not want to tell Officer Gates anything for fear of wording it incorrectly. (Conf. Exs., p.37.) The VA medical records indicated that Mr. Reale voluntarily admitted himself

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<sup>1</sup> All citations to the Confidential Exhibits refer to the 89-page PDF electronic document.

after “he fondled a prepubescent girl. . . .” (Conf. Exs., p.37 (internal quotation marks omitted)).

The State filed a Criminal Complaint alleging Mr. Reale had committed the crime of lewd conduct with a minor under sixteen years of age, felony, in violation of Idaho Code § 18-1508. (R., pp.9-10.) The State later filed an Amended Criminal Complaint alleging Mr. Reale had committed one count of felony lewd conduct with a minor under sixteen years of age, and one count of felony sexual abuse of a child under sixteen years of age. (R., pp.47-48.) After Mr. Reale waived a preliminary hearing, the magistrate bound him over to the district court. (R., pp.57, 59-60.) The State then filed an Information charging Mr. Reale with one count of lewd conduct and one count of sexual abuse. (R., pp.63-64.) Mr. Reale initially entered a not guilty plea to the charges. (R., p.70.)

Pursuant to a plea agreement, Mr. Reale subsequently agreed to plead guilty to the sexual abuse count, and the State agreed to dismiss the lewd conduct count. (R., p.92.) The district court accepted Mr. Reale’s guilty plea. (R., p.93.)

The State then filed a Restitution Request, asking for an award of \$391.35 to the Idaho Industrial Commission’s Crime Victim’s Compensation Program (CVCP). (R., pp.96-99.) Later, the State filed an Amended Restitution Request, asking for an award of \$698.65 to the CVCP and an award of \$10,260.00 to Kathryn Shepard and Carter Shepard, the parents of M.S. (R., pp.100-04.) The total requested restitution of \$10,958.65 broke down as follows:

CVCP	CARES Examination	\$307.50
	St. Luke’s Clinic Examination	\$391.35
	<b>Total</b>	<b>\$698.65</b>
The Shepards	Kathryn Shepard Lost Wages	\$3220.00
	Carter Shepard Lost Wages	\$1000.00

Mileage: 80 Miles At \$0.50 Per Mile	\$40.00
Tuition For Failed Classes	\$6000.00
<b>Total</b>	<b>\$10,260.00</b>

(See R., p.100.)

At the sentencing hearing, the State recommended that the district court impose a unified sentence of fifteen years, with five years fixed. (Tr., p.40, Ls.17-23.) Mr. Reale recommended that the district court place him on probation. (Tr., p.46, L.24 – p.48, L.15.) The district court then imposed a unified sentence of fifteen years, with three years fixed. (R., pp.110, 112-18.) Mr. Reale filed a Notice of Appeal timely from the district court’s Judgment of Conviction. (R., pp.124-26.)

At the subsequent restitution hearing, the State, based upon the testimony of the Shepards, requested a modified total restitution award of \$11,862.68. (Tr., p.106, Ls.16-19.) The increase came from the State’s request for \$3315.68 instead of \$3220.00 for Ms. Shepard’s lost wages, \$1200.00 for private school tuition, and \$167.00 for child care expenses. (See Tr., p.106, L.20 – p.107, L.6; State’s Ex. 1.)

Ms. Shepard’s requested lost wages were from when she missed part or all of her 12-hour shifts as a night charge nurse on the nights before scheduled counseling sessions or court proceedings. (See Tr., p.72, L.13 – p.86, L.15; State’s Ex. 1, p.1.) She reported that she missed a total of 92 hours of work, at an hourly rate of \$36.04, for a total of \$3315.68. (State’s Ex. 1, p.1.) Ms. Shepard represented that she missed part or all of her shifts because she wanted to be “rested” for the court proceedings. (Tr., p.83, Ls.19-24.) Mr. Reale asserted, with respect to those requested lost wages, that it was not foreseeable “that someone would miss a 12-hour shift the night before a court hearing in order to be there for that hearing in the morning.” (Tr., p.110, Ls.18-21.)

After the restitution hearing, the district court issued its Memorandum Decision Re: Restitution. (R., pp.140-47.) The district court awarded Ms. Shepard \$3315.68 for lost wages, and awarded Mr. Shepard \$1000.00 for lost income. (R., p.144.) The district court also awarded the Shepards \$40.00 for mileage expenses for driving M.S. to her CARES interview and physical examination. (R., p.144.)

However, the district court denied the Shepards' request for \$1200.00 for M.S.'s private school tuition, because they enrolled M.S. in a private school to prevent future harm and the tuition expenses were thus not recoverable as restitution. (R., p.145.) The district court also denied Mr. Shepard's request for \$6000.00 for repayment of his student loans, because there was insufficient evidence to establish a causal nexus between Mr. Reale's conduct and the repayment of the loans, which would have to be repaid in any event. (R., p.145.)

In the Judgment/Order of Restitution, the district court awarded CVCP a total of \$698.65 and the Shepards a total of \$4355.68. (R., pp.148-150.)



### ISSUES

1. Did substantial evidence support the restitution award of \$3315.68 to Ms. Shepard for lost wages?
2. Did the district court abuse its discretion when it imposed a unified sentence of fifteen years, with three years fixed, upon Mr. Reale following his plea of guilty to sexual abuse of a child under sixteen years of age?

## ARGUMENT

### I.

#### Substantial Evidence Did Not Support The Restitution Award Of \$3315.68 To Ms. Shepard For Lost Wages

##### A. Introduction

Mr. Reale asserts that substantial evidence did not support the restitution award of \$3315.68 to Ms. Shepard for lost wages, because the award was for time she spent resting instead of going to work. Alternatively, even if Ms. Shepard's time spent resting instead of going to work is awardable as restitution for lost wages, substantial evidence did not support the full award of \$3315.68.

##### B. Standard Of Review And Applicable Law

A district court has discretion over the decision whether, and in what amount, to award restitution, guided by the factors set forth in I.C. § 19-4304(7). *State v. Corbus*, 150 Idaho 599, 602 (2011). "The issue of causation in restitution cases is a question of fact to be decided by the trial court." *Id.* "The district court's factual findings with regard to restitution will not be disturbed on appeal if supported by substantial evidence." *State v. Straub*, 153 Idaho 882, 885 (2013) (internal quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept to support a conclusion." *Id.*

Idaho Code § 19-5304 provides that: "Unless the court determines that an order of restitution would be inappropriate or undesirable, it shall order a defendant found guilty of any crime which results in an economic loss to the victim to make restitution to the victim." I.C. § 19-5304(2). "Restitution shall be ordered for any economic loss which the victim actually suffers." *Id.* The definition of "economic loss" includes "lost

wages” as well as “direct out-of-pocket losses or expenses.” I.C. § 19-5304(1)(a). “Economic loss shall be based upon the preponderance of evidence submitted to the court by the prosecutor, defendant, victim or presentence investigator.” I.C. § 19-5304(6).

“[I]n order for restitution to be appropriate, there must be a causal connection between the conduct for which the defendant is convicted and the injuries suffered by the victim.” *Corbus*, 150 Idaho at 602. This is because Section 19-5304 permits restitution for “any crime which results in an economic loss to the victim.” I.C. § 19-5304(2). Further, Section 19-5304 defines “victim” as a “directly injured victim which means a person or entity, who suffers economic loss or injury *as the result of the defendant’s criminal conduct* and shall also include the immediate family of a minor . . . .” I.C. § 19-5304(1)(e)(i) (emphasis added).

For purposes of criminal restitution, “causation consists of actual cause and true proximate cause.” *Corbus*, 150 Idaho at 602 (citing *State v. Lampien*, 148 Idaho 367, 374 (2009)). “Actual cause is the factual question of whether a particular event produced a particular consequence.” *Id.* (internal quotation marks omitted). “[T]rue proximate cause deals with whether it was reasonably foreseeable that such harm would flow from the negligent conduct.” *Id.* (internal quotation marks omitted). “In analyzing proximate cause, [the reviewing Court] must determine whether the injury and manner of occurrence are so highly unusual that a reasonable person, making an inventory of the possibilities of harm which his conduct might produce, would not have reasonably expect the injury to occur.” *Id.* (internal quotation marks omitted).

“An intervening, superseding cause,” which is “an independent act or force that breaks the causal chain between the defendant’s culpable act and the victim’s injury,”

generally “replaces the defendant’s act as the proximate cause of the victim’s injury.” *Id.* (internal quotation marks omitted). “[T]o relieve a defendant of criminal liability, an intervening cause must be an unforeseeable and extraordinary occurrence.” *Id.* at 602-03. “The defendant remains criminally liable if either the possible consequence might reasonably have been contemplated or the defendant should have foreseen the possibility of harm of the kind that could result from his act.” *Id.* at 603 (internal quotation marks omitted).

C. Substantial Evidence Did Not Support The Award Of \$3315.68 For Lost Wages To Ms. Shepard, Because The Award Was For Time She Spent Resting Instead Of Going To Work

Substantial evidence does not support the district court’s award of \$3315.68 for lost wages to Ms. Shepard, because the award was for time she spent resting instead of going to work. As discussed above, Ms. Shepard represented that she missed part or all of her shifts because she wanted to be “rested” for the court proceedings. (Tr., p.83, Ls.19-24.) The district court justified the award for lost wages on the basis that Ms. Shepard “took off time for court so that she could be prepared for court if her participation in the proceedings may be required. This is understandable given the fact that she works evenings and would have little rest after her work day before attending court.” (R., p.143.) The district court also stated that, “It is not unreasonable for her to take off time to be prepared for court. . . . [Ms. Shepard] took her time off in 4 hour blocks and did her best to find coverage for her blocks of time to avoid taking off more time than necessary to be prepared and attentive in court.” (R., p.143.)

Whether a district court may award “lost wages” restitution for time a victim spent resting instead of going to work is a question of first impression. Mr. Reale asserts that Section 19-5304 does not contemplate awarding victims lost wages for taking time off

work to be rested or prepared before attending court proceedings. Ms. Shepard, by spending time resting instead of going to work, did not suffer an economic loss analogous to lost wages. Her choice to spend time resting instead of going to work was an intervening, superseding cause that severed the causal link between Mr. Reale's criminal conduct and Ms. Shepard's loss of wages. Thus, substantial evidence does not support the district court's award of \$3315.68 for lost wages to Ms. Shepard.

A district court may award victims restitution for time spent attending court proceedings (including travel time) instead of going to work. Thus, Ms. Shepard would be "entitled to lost wages for time off that was reasonable to enable [her] to attend court proceedings, including travel time." See *State v. Houser*, 155 Idaho 521, 314 P.3d 203, 211 (Ct. App. 2013); *State v. Olpin*, 140 Idaho 377, 379 (Ct. App. 2004) (holding that a victim company that sent its vice president to a restitution hearing suffered economic loss as contemplated by I.C. § 19-5304(1)(a), because "the victim in this case lost the full value of the time its vice president spent attending court proceedings"); *State v. Russell*, 126 Idaho 38, 39 (Ct. App. 1994) (*per curiam*) (holding that "the time spent in court by a self-employed victim during which that person could otherwise be pursuing his vocation, but who has been called to testify about the losses caused to him through criminal conduct of the defendant, has suffered an economic loss within the meaning of I.C. § 19-5304(1)(a)").

Victims may request restitution for time spent attending court proceedings instead of going to work because the loss suffered by victims through court attendance is closely analogous to lost wages. As explained above, the definition of "economic loss" includes "lost wages." I.C. § 19-5304(1)(a). By analogy to lost wages, the *Russell* Court concluded "that the time spent in court by a self-employed victim *during which*

*that person could otherwise be pursuing his vocation*, but who has been called to testify about the losses caused to him through criminal conduct of the defendant, has suffered an economic loss” for purposes of criminal restitution. *Russell*, 126 Idaho at 39 (emphasis added).

In view of *Russell*, the *Olpin* Court held that the victim company suffered economic loss because it “lost the full value of the time its vice president spent attending court proceedings.” *Olpin*, 140 Idaho at 379. The victim company’s employees “were diverted from their normal duties to . . . court attendance tasks as a result of [the defendant’s] offense.” *Id.*

Later, the *Houser* Court discussed lost wages restitution for court attendance in terms of missing work to attend court. *See Houser*, 155 Idaho at \_\_\_, 314 P.3d at 210. While “a victim who attends court proceedings will necessarily *miss work* for longer than the duration of the proceeding in his or her case” because of the vagaries of court scheduling, “this uncertainty factor justifies *presence at the courthouse* only before a proceeding begins, not after it ends.” *Id.* at \_\_\_, 314 P.3d at 210 (emphasis added).

Additionally, a victim’s choice to miss work to attend court is foreseeable, not an intervening, superseding cause. The *Houser* Court held that the victim’s “choice to attend most, if not all, of the proceedings was not an intervening, superseding cause that severed the causal link between [the defendant’s] criminal behavior and [the victim’s] loss of wages.” *Id.* at \_\_\_, 314 P.3d at 210. This was because it was “not unforeseeable” that a crime victim would want to attend and actually attend most or all court proceedings, the importance of a given proceeding may not be evident to a victim, and the importance of a proceeding to a victim may be different than the importance of a proceeding to the disposition of a case. *Id.* at \_\_\_, 314 P.3d at 210.

In contrast to the victims in *Houser*, *Olpin*, and *Russell*, Ms. Shepard did not request restitution for time spent attending court proceedings instead of going to work. The district court recognized that “the court hearings in [Mr. Reale’s] case were generally held between 9:00 a.m. and 12:00 p.m. and that these hearings were not held during [Ms. Shepard’s] hours of work (7:00 p.m. to 7:30 a.m.).” (R., p.143.) She “took off time for court so that she could be prepared for court if her participation in the proceedings may be required.” (R., p.143) Thus, Ms. Shepard requested restitution for time spent resting instead of going to work, not time spent actually attending court proceedings.

Ms. Shepard, by spending time resting instead of going to work, did not suffer an economic loss analogous to lost wages. Unlike the victims in *Houser*, *Olpin*, and *Russell*, Ms. Shepard did not miss work to attend court proceedings scheduled at the same time as work. Thus, Ms. Shepard did not spend any time in court when she could otherwise have been “pursuing her vocation.” *Cf. Russell*, 126 Idaho at 39. Nor was Ms. Shepard “diverted from [her] normal duties” to attend court. *Cf. Olpin*, 140 Idaho at 379. She did not “miss work” because of her “presence at the court.” *Cf. Houser*, 155 Idaho at \_\_\_\_, 314 P.3d at 210.

Further, Ms. Shepard’s choice to spend time resting instead of going to work was an intervening, superseding cause that severed the causal link between Mr. Reale’s criminal conduct and Ms. Shepard’s loss of wages. It was not reasonably foreseeable that, as a result of Mr. Reale’s criminal conduct, Ms. Shepard would miss work during hours where no court proceedings took place. *See Corbus*, 150 Idaho at 602-03. Rather, it is “unforeseeable and extraordinary” that a victim like Ms. Shepard, in order to

attend court proceedings, would have to miss work during hours where no court proceedings took place. See *id.* at 602-03.

A reasonable person in Mr. Reale's position, "making an inventory of the possibilities of harm which his conduct might produce, would not have reasonably expected" Ms. Shepard to miss partial or entire shifts at work to attend court proceedings that occurred not during, but *after* those shifts. *Houser*, 155 Idaho at \_\_\_, 314 P.3d at 207 (internal quotation marks omitted); see also *Corbus*, 150 Idaho at 604-05 (holding that a reasonable person in the defendant's position of driving dangerously at night would have reasonably foreseen that a passenger might have been injured after jumping from the vehicle to escape the dangerous situation). Thus, her choice to spend time resting instead of going to work was an intervening, superseding cause that severed the causal link between Mr. Reale's criminal conduct and Ms. Shepard's loss of wages. Cf. *Corbus*, 150 Idaho at 604-05; *Houser*, 155 Idaho at \_\_\_, 314 P.3d at 210.

In sum, Section 19-5304 does not contemplate awarding victims lost wages for time spent resting before attending court proceedings. Ms. Shepard, by spending time resting instead of going to work, did not suffer an economic loss analogous to lost wages. Her choice to spend time resting instead of going to work was an intervening, superseding cause that severed the causal link between Mr. Reale's criminal conduct and Ms. Shepard's loss of wages. Thus, substantial evidence does not support the district court's restitution award of \$3315.68 to Ms. Shepard for lost wages, because the award was for time she spent resting instead of going to work. The district court's restitution award of \$3315.68 for Ms. Shepard's lost wages should be vacated and the matter remanded for the entry of a new restitution order reducing the amount of restitution awarded to the Shepards by \$3315.68.



D. Even If Ms. Shepard's Time Spent Resting Instead Of Going To Work Is Awardable As Restitution For Lost Wages, Substantial Evidence Did Not Support The Full Award Of \$3315.68

Alternatively, even if Ms. Shepard's time spent resting instead of going to work is awardable as restitution for lost wages because she suffered economic loss analogous to lost wages and her choice to rest before attending court proceedings was foreseeable as opposed to an intervening, superseding cause, substantial evidence did not support the full award of \$3315.68. Ms. Shepard requested restitution for five entire 12-hour shifts off work, as well as for several partial shifts off work. (State's Ex. 1, p.1.) However, it was not reasonably necessary for her to take entire 12-hour shifts off work to be rested before court proceedings. Further, the voluntary choices of the third party or parties who decided not to cover those entire 12-hour shifts constituted an intervening, superseding cause that precludes a finding that Mr. Reale's criminal conduct was the proximate cause of Ms. Shepard's economic loss for the entire shifts.

"[I]n the absence of evidence of a justification, a court may not presume that loss of an entire work day is justified for every attendance at a hearing regardless of its duration or time of day." *Houser*, 155 Idaho at \_\_\_, 214 P.3d at 211. "For example, an individual wishing to attend a hearing that is scheduled for 9 a.m., together with numerous other hearings, may have to wait from 9 a.m. to 11 a.m. before his or her case is taken up by the court; but that would not necessarily justify taking the remainder of the day off work if the hearing was concluded by noon." *Id.* at \_\_\_, 214 P.3d at 210.

The record in *Houser* contained no evidence that the victim's employer did not allow the victim to take partial days off work to attend court proceedings, which undermined the district court's finding that uncertainty about hearing times caused the victim to take entire days off work. *Id.* at \_\_\_, 314 P.3d at 211. Because "[t]he State did

not show what portion of [the victim's] time off work was reasonably necessary for his attendance at the court proceedings and what portion, if any was caused by his voluntary choice not to work for the remainder of the day," the Court held that "the district court's award of restitution for entire days off work is not supported by substantial evidence and must be vacated." *Id.* at \_\_\_, 314 P.3d at 211.

Similarly, the evidence here indicates that Ms. Shepard could have taken, and did take in some instances, partial shifts off work to be "rested" for the court proceedings she attended. For example, she took four hours each off her shifts before a CARES examination and three court proceedings. (State's Ex. 1, p.1.) Additionally, Ms. Shepard took eight hours off work before, respectively, a CARES interview and one court proceeding. (State's Ex. 1, p.1.) Ms. Shepard's taking partial shifts off work suggests that it was not "reasonably necessary" for her to take entire 12-hour shifts off work to be rested "for [her] attendance at the court proceedings." *See Houser*, 155 Idaho at \_\_\_, 314 P.3d at 211. In fact, Ms. Shepard appeared to prefer to not take entire 12-hour shifts off work. (See Tr., p.73, Ls.2-5.)

Ms. Shepard testified that the reason she missed her entire 12-hour shifts before five court proceedings (see State's Ex. 1, p.1), was that she was unable to find anyone to cover those shifts. (See Tr., p.73, Ls.2-5; p.82, Ls.11-19, p.83, Ls.16-18.) According to Ms. Shepard, it was "kind of hard" to "find people to switch schedules with me." (Tr., p.73, Ls.2-5.) The voluntary choices of the third party or parties who decided not to switch schedules and cover Ms. Shepard's shifts constituted an intervening, superseding cause that precludes a finding that Mr. Reale's criminal conduct was the proximate cause of Ms. Shepard's economic loss for those entire 12-hour shifts. *See Corbus*, 150 Idaho at 602-03; *Houser*, 155 Idaho at \_\_\_, 314 P.3d at 211. It was not

reasonably foreseeable that, as a result of Mr. Reale's criminal conduct, those third parties would decline to cover Ms. Shepard's shifts. *Cf. Corbus*, 150 Idaho at 604-05; *Houser*, 155 Idaho at \_\_\_, 314 P.3d at 211. Thus, even if it were reasonably necessary for Ms. Shepard to take partial shifts off work to attend court proceedings that occurred after those shifts, the award of restitution for the entire 12-hour shifts off work was not supported by substantial evidence.

In short, even if Ms. Shepard's time spent resting instead of going to work is awardable as restitution for lost wages, substantial evidence did not support the full award of \$3315.68. It was not reasonably necessary for her to take entire 12-hour shifts off work to be rested before court proceedings. Further, the voluntary choices of the third party or parties who decided not to cover those shifts constituted an intervening, superseding cause that precludes a finding that Mr. Reale's criminal conduct was the proximate cause of Ms. Shepard's economic loss for those entire 12-hour shifts. Thus, the district court's restitution award of \$3315.68 for Ms. Shepard's lost wages should be vacated and the matter remanded for a new determination of the amount of Ms. Shepard's lost wages proximately caused by Mr. Reale's criminal conduct.

## II.

### The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Fifteen Years, With Three Years Fixed, Upon Mr. Reale Following His Plea Of Guilty To Sexual Abuse Of A Child Under Sixteen Years Of Age

Mr. Reale asserts that the district court abused its discretion when it imposed his sentence because his unified sentence of fifteen years, with three years fixed, is excessive considering any view of the facts. The district court should have instead placed Mr. Reale on probation as he recommended, or imposed a lesser sentence.

Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving “due regard to the nature of the offense, the character of the offender, and the protection of the public interest.” *State v. Strand*, 137 Idaho 457, 460 (2002).

The Idaho Supreme Court has held that, “[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.” *State v. Jackson*, 130 Idaho 293, 294 (1997) (internal quotation marks omitted). Mr. Reale does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Reale must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.* An appellate court, “[w]hen reviewing the length of a sentence . . . consider[s] the defendant’s entire sentence.” *State v. Oliver*, 144 Idaho 722, 726 (2007). The reviewing court will “presume that the fixed portion of the sentence will be the defendant’s probable term of confinement.” *Id.*

Mr. Reale submits that, because the district court did not give adequate consideration to mitigating factors, the sentence imposed by the district court is excessive considering any view of the facts. Specifically, the district court did not adequately consider Mr. Reale’s low risk to reoffend. Mr. Reale’s Static-99R actuarial risk assessment, administered during his psychosexual evaluation conducted by Dr. Linda Hatzenbuehler, resulted in a total score of -2, “which places him in the low risk

category for being charged or convicted of another sexual offense based solely on the Static-99R.” (Conf. Exs., pp.10, 17.)

The psychosexual evaluation also involved the Stable-2007 and Risk for Sexual Violence Protocol (RSVP) instruments, which “assess dynamic (changeable) aspects of an individual’s life that have been found to be related to or prevent sex offense recidivism.” (Conf. Exs., p.20.) “Mr. Reale scored in the **Moderate** range on the Stable-2007. Combining his Static-99R score (**Low**) with his Stable-2007 score results in a combined rating of **Low** risk to reoffend.” (Conf. Exs., p.21 (emphasis in original).) The RSVP, which does not yield a risk score or probability of reoffending, showed that, while Mr. Reale had the treatment issue of being a victim of sexual abuse himself and having some deviate sexual interests, also had protective factors or assets including “his lack of a significant criminal history, his long term intimate relationship and the fact that he is not a substance abuser nor does he currently meet criteria for a serious mental illness.” (Conf. Exs., pp.25-26.)

In sum, the psychosexual evaluation concluded that “Mr. Reale’s risk level falls within the Low range for re-offense based upon static factors. Adding dynamic factors, his risk level resulted in his risk range remaining in the low risk range for re-offense.” (Conf. Exs., p.26.) Although his risk “is highest for young females known to him” and his “contact with young children should be supervised,” Mr. Reale “does not appear to be a risk to the community at large.” (Conf. Exs., p.26.)

While the district court noted “from the static and other dynamic factors that Dr. Hatzenbuehler relied upon in her testing that statistically [Mr. Reale] would be a low risk to reoffend,” the district court also noted that “those dynamic factors and those static factors upon which those actuarial measures are made do not consider the level

of risk when there is acknowledgement that such similar behavior has occurred in the past.” (Tr., p.54, Ls.2-10.) However, the Stable-2007 assessment of dynamic factors actually considered Mr. Reale’s “Deviant Sexual Preferences,” including that “[h]e appears to have had more than one deviant victim (under the age of 14).” (Conf. Exs., p.12.) The psychosexual evaluation also mentioned several past episodes of reported “similar behavior” in its account of Mr. Reale’s sexual history. (See Conf. Exs., pp.14-15.) Thus, the psychosexual evaluation, when it assessed Mr. Reale’s static and dynamic risk factors, considered his reported prior sexual behavior. Mr. Reale was still found to be a low risk to reoffend. (Conf. Exs., p.26.) Adequate consideration of Mr. Reale’s low risk to reoffend should have resulted in a lesser sentence.

Additionally, the district court did not give adequate consideration to Mr. Reale’s own history of being a victim of sexual abuse. When Mr. Reale was four years old, his female babysitter molested him. (Conf. Exs., p.14.) She made him perform oral sex on her. (Conf. Exs., p.14.) Mr. Reale could not specifically recall how many times the molestations happened, but indicated he had flashbacks to the molestations during his sexual conduct with M.S. (Conf. Exs., p.14.) Mr. Reale’s own history of being a victim of sexual abuse does not excuse his behavior, but it does help explain it. Adequate consideration of Mr. Reale’s own history of being a victim of sexual abuse should have resulted in a lesser sentence.

The district court also did not adequately consider Mr. Reale’s physical health problems. Mr. Reale served in the United States Marine Corps from 1965 to 1969, and did one tour in Vietnam. (Conf. Exs., pp.13, 40-41.) While in Vietnam, he was exposed to Dioxin (Agent Orange). (Conf. Exs., p.41.) Mr. Reale was finally diagnosed with Dioxin poisoning in the early 1990s, and since then he has received 100% VA disability

benefits. (Conf. Exs., p.12.) The Dioxin poisoning caused Mr. Reale to develop diabetes, peripheral artery disease, and blindness. (Conf. Exs., p.41.) Mr. Reale is legally blind. (Conf. Exs., p.41.) Adequate consideration of Mr. Reale's physical health problems should have resulted in a lesser sentence.

Further, the district court did not adequately consider Mr. Reale's grief over the illness and death of his wife. Mr. Reale married his wife, Dixie Reale, in 1967, and they had two children. (Conf. Exs., p.40.) Before the conduct underlying the instant offense occurred, Ms. Reale had been ill for over a year. (See Tr., p.51, Ls.8-9.) Mr. Reale struggled to get her medical attention, but "she was a very stubborn lady" and he would not argue with her. (Tr., p.51, Ls.9-13.) Mr. Reale told the district court, "It wasn't until she couldn't get up off the floor that she finally agreed that she had to go to the hospital to be checked." (Tr., p.51, Ls.14-16.) Unfortunately, Ms. Reale passed away from cancer about a month after Mr. Reale's arrest for the instant offense. (See Conf. Exs., p.40; R., pp.16-17.)

At the sentencing hearing, Mr. Reale's counsel related that Mr. Reale had "spent a very significant period of time in jail missing the last weeks of his wife's life, having not had a memorial service or funeral for his wife at this point." (Tr., p.48, Ls.22-25.) Mr. Reale told the district court, "I have yet to mourn my wife. I've been mourning her since she went to the hospital, and it's already, what, five or six months, seven months." (Tr., p.51, L.24 – p.52, L.3.) Even though the district court told Mr. Reale, "I'm aware of the stress that you were under with respect to your wife and the illness" (Tr., p.56, Ls.2-4), adequate consideration of Mr. Reale's grief over the sickness and death of his wife should have resulted in a lesser sentence.

Because the district court did not adequately consider the above mitigating factors, the sentence imposed by the district court is excessive considering any view of the facts. Thus, the district court abused its discretion when it imposed Mr. Reale's unified sentence of fifteen years, with three years fixed.

### CONCLUSION

For the above reasons, Mr. Reale respectfully requests that this Court vacate the district court's restitution award of \$3315.68 for Ms. Shepard's lost wages and remand the matter for the entry of a new restitution order reducing the amount of restitution awarded to the Shepards by \$3315.68. Alternatively, he respectfully requests that this Court vacate the district court's restitution award of \$3315.68 for Ms. Shepard's lost wages and remand the matter for a new determination of the amount of Ms. Shepard's lost wages proximately caused by Mr. Reale's criminal conduct.

Mr. Reale also respectfully requests that this Court reduce his sentence as it deems appropriate. Alternatively, he respectfully requests that his case be remanded to the district court for a new sentencing hearing.

DATED this 1<sup>st</sup> day of July, 2014.

  
BEN P. MCGREEVY  
Deputy State Appellate Public Defender



CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 1<sup>st</sup> day of July, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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